IN THE

Supreme Court of the United States

October Term, 1977

No. 77-56

IN THE MATTER OF EDNA SMITH, APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

This is a state court disciplinary proceeding. The final order of the South Carolina Supreme Court finding misconduct and imposing discipline was entered March 17, 1977. The opinion, as yet unpublished, is attached to the Jurisdictional Statement (la-14a). The Notice of Appeal to this Court was filed on April 15, 1977. On June 15, 1977, by order of Chief Justice Burger, the time within which to docket the appeal was extended to July 11, 1977. The Jurisdictional Statement was filed and the appeal docketed on July 9, 1977. Probable jurisdiction was noted on October 3, 1977. This Court has jurisdiction under 28 U. S. C. §1257 (2).

QUESTIONS PRESENTED

I. Whether it is beyond the power of the state courts to protect the public against an attorney's inducement of an unwilling citizen, already aware of her legal rights, to file suit against another private citizen?

II. Whether an attorney is denied due process of law when he is informed of all the facts upon which the claim of misconduct is based, fails to object to the charges as stated in the complaint, and is subsequently found by the court to have engaged in conduct clearly prohibited by the court's disciplinary rules?

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

UNITED STATES CONSTITUTION, Amendment One:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

UNITED STATES CONSTITUTION, Amendment Fourteen:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The applicable sections of the ABA Code of Professional Responsibility, as adopted by the South Carolina Supreme

Court and embodied in its Rule on Disciplinary Procedure, Vol. 22, CODE OF LAWS OF SOUTH CAROLINA, 1976, are as follows:

> DR 2-103. Recommendation of Professional Employment.
>
> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:
>
> • • •
>
> (5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
>
> (a) The primary purposes of such organization do not include the rendition of legal services.
>
> (b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.
>
> (c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.
>
> (d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.
>
> DR 2-104. Suggestion of Need of Legal Services.
>
> (A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal

action shall not accept employment resulting from that advice, except that:

• • •

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

STATEMENT

The Appellant Edna Smith, a member of the South Carolina Bar, was publicly reprimanded on March 17, 1977, by the South Carolina Supreme Court for violations of Disciplinary Rules 2-103 (D) (5) (a) and (c) and 2-104 (A) (5) of the Code of Professional Responsibility.[1] The Court below found that Appellant had solicited a client on behalf of the American Civil Liberties Union, an organization to which she belonged and served as an attorney. Appellant Smith has filed this appeal seeking to reverse the decision of the South Carolina Supreme Court.

Appellant's Practice

Appellant Smith is an attorney licensed to practice in South Carolina, having been admitted to the bar in 1972 (App. 86). She became an at-large member of the Board of Directors of the American Civil Liberties Union in South Carolina and has served as Vice-President of that Board since 1973 (App. 88-89). Appellant has represented clients for the ACLU as a cooperating attorney (App. 107).

After her admission to the bar, Appellant became a partner in the "Carolina Community Law Firm," a private

[1] Paragraph 4(b) defines misconduct as a violation of any of the Canons of Professional Ethics adopted by the Court from time to time. J.S.A. 18a. On March 1, 1973, the South Carolina Supreme Court adopted the American Bar Association's Code of Professional Responsibility.

law firm, whose other members were Herbert Buhl[2] and Carlton Bagly[3] (App. 147). The firm was organized to pursue "public interest" litigation involving welfare, prison, consumer, and other similar issues (App. 133). The members of the firm sought attorney fees for their representation of clients in "public interest" cases through grants from various foundations (App. 133). During 1973, two members of the law firm received grants from organizations including Appellant Smith who received a $10,000 fee to serve as legal consultant to the South Carolina Council on Human Relations, a private organization (App. 128-9, 144). During 1973, Appellant's firm continued their involvement and efforts in "public interest" litigation in order to continue their foundation support, and Appellant testified that the firm was hopeful of additional money coming to the firm through these efforts (App. 144-145). Appellant recognized the necessity of having clients in welfare and consumer areas in order to continue the firm's foundation support (App. 145). Subsequently, after the events in question, the firm determined that it would not be fully funded through fees from various organizations, and changed the firm's name to Buhl, Smith & Bagby (App. 133).

[2] Herbert Buhl, a South Carolina attorney, has served as the staff attorney for the ACLU in South Carolina. He is paid a salary by the ACLU Foundation of New York (App. 134-135). The Appellant maintains that the Supreme Court erroneously found that Mr. Buhl was counsel in *Doe v. Pierce*, Civ. No. 74-475 (D.S.C.). Appellant's Brief, page 17, fn. 2. However, in a deposition of Shirley Brown, a plaintiff in *Doe v. Pierce*, Mrs. Brown testified that Mr. Buhl was her attorney and that she had discussed her case with Mr. Buhl and Appellant on several occasions (Respondent's [Appellant's] Exhibit No. 3 to Panel Hearing, Deposition of Mary Roe, page 5-7). The firm of Buhl, Smith & Bagby (or Carolina Community Law Firm) was listed as attorneys of record in *Doe v. Pierce*. The office of the ACLU in South Carolina was physically located in the same offices as Appellant's firm at the time of these events.

[3] Carlton Bagby, also a South Carolina attorney, served as a cooperating attorney with the ACLU and was also counsel of record for the ACLU in *Doe v. Pierce*, No. 74-475 (D.S.C. 1974), *aff'd in part and rev'd in part*. 560 F. 2d 609 (4th Cir. 1977).

The Aiken Meeting

In July, 1973, an Aiken resident, Gary Allen, called the South Carolina Council on Human Relations to seek its assistance in advising certain women, who had agreed to be sterilized by their private physician after their third pregnancy.[4] An employee of the Council requested Appellant to investigate the situation and to talk to the women about the sterilization (App. 90-91). Appellant called Mr. Allen and requested that he arrange a meeting with the women who had been sterilized (App. 90, 125). Although Mr. Allen had been a friend of Mrs. Williams' family for a number of years (App. 65), she had never sought his advice on legal or other matters and was unaware of the proposed meeting (App. 30, 65). On the day of the meeting, Mr. Allen approached Mrs. Williams as she left the Aiken County Hospital where her baby was being treated for severe dehydration and was not expected to live (App. 30). The following conversation took place between Mr. Allen and Mrs. Williams:

> He just told me that I was the person that he wanted to see. And I said, "About what?" He said, "Wasn't Dr. Pierce your doctor?" I told him, "Yes." He said, "Well, didn't he operate on you?" I said, "Yes, he did." He said, "Well, you come on down to my office because there are some people down here that would like to talk to you." I said, "What kind of people, look, I don't have time to be bothered because I got a baby in the hospital and they look for my baby to die and I aint's got time for this kind of mess." He said, "There was some attorneys there and would like to see me and would like to represent me in suing the doctor for money." I said, "What the doctor did?" He said, "Because the doctor steriled [sic] you, you cannot have any more kids." And I said, "Yes, I know that, I know that, he explained that to me before I even signed the paper (App. 41).

Mrs. Williams decided to attend the meeting "to see what it was all about" (App. 41). Present at the meeting in addition to the Appellant, Mr. Allen, and Mrs. Williams were two other women, Dorothy Waters and Virgil Walker,[5] and members of the news media[6] (App. 92). Appellant Smith introduced herself to the group including Mrs. Williams and indicated that she was an attorney with the ACLU (App. 93). She had a personal conversation with Mrs. Williams, which Appellant later related at the grievance hearing:

> [I] asked her her name and if she had been sterilized. She said she had. And I asked her if she wanted to discuss it. And she went into details about the doctor involved, when the incident occurred, when she first went to see the doctor, and how the issue of being sterilized came up before her baby could be delivered. She went through a chronological statement of what took place and to explain to me that she had, in effect, been sterilized, and that her baby was dehydrated, I think she mentioned, and it was now under a doctor's care and that she was concerned for her baby's health (App. 93).

Appellant explained to the group, including Mrs. Williams, that they had certain rights under the Constitution (App.

[4] As noted by the United States Court of Appeals for the Fourth Circuit, Dr. Clovis H. Pierce was a qualified and experienced physician in Aiken, South Carolina, who established a personal economic philosophy in the treatment of certain patients, which he publicly and freely announced and constantly pursued. Dr. Pierce testified at the trial that:

> My policy was with people who were unable to financially support themselves, whether they be on Medicaid or just unable to pay their own bills, if they are having a third child, to request they voluntarily submit to sterilization following the delivery of the third child. If they did not wish this as a condition for my care, then I requested that they seek another physician other than myself. *Walker v. Pierce*, 560 F. 2d 609, 611 (1977).

[5] Mrs. Walker was a plaintiff in the subsequent law suit of *Doe v. Pierce*, No. 74-475 (D.S.C. 1974).

[6] Appellant was the only member of the ACLU present at the meeting (App. 47).

109), that women should have their own rights as to whether they wanted to be sterilized, and that what Dr. Pierce was doing was wrong (App. 31, 111, 130). She advised the group in general that there were certain legal remedies (App. 110) and Mrs. Williams in particular that if the sterilization had been coerced she could bring a law suit (App. 31, 111). According to Mrs. Williams, the Appellant advised her that she could recover money damages and that Appellant would be Mrs. Williams' attorney (App. 32).[7] Appellant also informed the group that the ACLU was an organization that could render legal services to these women (App. 131).

Mrs. Williams had not considered bringing a law suit against her doctor prior to her conversation with Appellant (App. 67). Mrs. Williams informed Appellant that her baby was critically ill in the hospital and she "wasn't hardly interested about suing anybody" (App. 42). When Mrs. Williams left the meeting, she informed Appellant that if Appellant's services were needed, she would call Appellant (App. 74).

The Solicitation

In the early part of August, 1973, the Appellant was informed by a board member of the South Carolina chapter of the ACLU and by a member of the national organization that both organizations were interested in pursuing litigation on the sterilization issue (App. 94-95). According to Appellant, the ACLU "wanted to get the women who were

[7] Appellant denies that she advised Mrs. Williams that she could bring a law suit, recover money damages, or that she would be Mrs. Williams' attorney. (App. 94). Appellant has sought to demonstrate that Mrs. Williams' testimony was contradictory (Appellant's Brief, p. 14, fn. 1). In fact, the record as a whole substantiates that Appellant informed Mrs. Williams that she would be the attorney but no fee was requested. Moreover, Appellant's testimony that she did not even mention a law suit was directly contradicted by her own witness, Mr. Allen, who testified that the women were advised that they could bring law suits (App. 201).

involved" (App. 116), and she was to contact the women (App. 95). The ladies had been instructed by Appellant to send their requests to the ACLU if they were interested in bringing suit (App. 97). However, prior to August 20, 1973, only one request had been received from a Mrs. Dorothy Waters (App. 116). Appellant had not received a request from Mrs. Williams for the ACLU to represent her (App. 138). Nevertheless, on August 30, 1973, Appellant wrote the letter which was the basis for the complaint in this case (App. 94). The letter[8] was as follows:

> You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a law suit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.
>
> Now I have a question to ask of you. Would you object to talking to a women's magazine about the situation in Aiken? The magazine is doing a feature story on the whole sterilization problem and wants to talk to you and others in South Carolina. If you don't mind doing this, call me collect at 254-8151 on Friday before 5:00, if you receive this letter in time. Or call me on Tuesday morning (after Labor Day), **collect.**[9]
>
> I want to assure you that this interview is being done to show you what is happening to women against their wishes, and is not being done to harm you in any way.

[8] The Appellant failed to include the letterhead of this letter in the Joint Appendix (App. 3). The letter was written on the stationery of Appellant's private law firm, Carolina Community Law Firm, and was signed by Appellant as Attorney-at-Law. Appellant testified that she often considered her private practice, including her representation of the Council on Human Relations, interrelated with her activities as a member of the Board of the ACLU in South Carolina and her representation of the ACLU as an attorney. Therefore, she did not consider it unusual that she wrote this letter on the stationery of her private law firm (App. 140).

[9] Appellant admitted that the magazine interview had been instigated by the ACLU office in New York (App. 126).

> But I want you to decide, so call me collect and let me know of your decision. This practice must stop.
>
> About the law suit, if you are interested, let me know, and I'll let you know when we will come down to talk to you about it. We will be coming to talk to Mrs. Waters at the same time; she has already asked the American Civil Liberties Union to file a suit on her behalf[10] (App. 3).

The Appellant admitted that in writing the letter of August 30, 1973, she was seeking members of the plaintiff class (App. 136-137) so "the ACLU could get clients" (App. 136). The Appellant contended that Mr. Gary Allen had written a letter to her [11] and had telephone conversations with her in which he indicated that some of the women were interested in bringing suit (App. 97).[12] Therefore, Appellant wrote to Mrs. Williams, because "I did know from talking to her that she was one of the ladies who had been sterilized" (App. 116). Appellant's contention that Mr. Allen had informed her that Mrs. Williams was interested in bringing suit (App 125) [13] is directly contradicted by her letter of August 30, 1973. The letter, rather than referring to her information about Mrs. Williams' interest in bringing suit, merely asks:

[10] Although Appellant testified that the ACLU had received a letter from Mrs. Dorothy Waters requesting representation, this testimony was allowed over objection, only with the understanding that the ACLU would introduce the letter into evidence. The letter from Mrs. Waters was not produced by the Appellant for the grievance panel (App. 96).

[11] Again, the Appellant was requested to produce this letter, as it was the best evidence of its contents; however, the letters were never produced by the Appellant for the Panel (App. 96).

[12] Mrs. Williams denied that she ever told Mr. Allen that she was interested in bringing a law suit (App. 43-44).

[13] Appellant contradicted herself at a later point in the hearing when she testified that before she wrote her letter she had received no request from Mrs. Williams (App. 138).

> About the lawsuit, if you are interested, let me know. . . (App. 4).[14]

The letter made no offer of free legal services and provided no information about Mrs. Williams' legal rights or remedies.[15] It merely recited the desire of the ACLU to bring a lawsuit on behalf of Mrs. Williams for money damages [16] (App. 3).

The letter was written by Appellant even though Appellant was aware that Mrs. Williams was under considerable strain due to the critical illness of her child (App. 42, 93), and even though Mrs. Williams had previously informed Appellant that she should contact Appellant if she desired representation (App. 74). The Appellant's letter became a part of a campaign to influence Mrs. Williams [17] into bringing suit against Dr. Pierce, as pointedly revealed by Mrs. Williams' testimony at the Panel hearing:

> I got tired of everybody aggravating me. Everyone was coming to ask me wasn't I going to sign to file a

[14] It is apparent in posing this question to Mrs. Williams that Appellant had not been informed by Mr. Allen that Mrs. Williams was interested in bringing suit. Such a conclusion is further supported by Appellant's testimony that the letter was intended to get Mrs. Williams to communicate her interest in bringing a law suit, to either the ACLU "or Mr. Allen" (App. 137).

[15] Mrs. Williams had already been advised at the July meeting of her legal rights and remedies and the availability of the ACLU to provide legal services to her (App. 131).

[16] Appellant's emphasis on money damages in their July meeting and her letter of August 30, 1973, obviously was intended as an inducement to Mrs. Williams to bring suit:

> Q. When Miss Smith talked to you about the possibility of a lawsuit against Dr. Pierce, did she mention anything else besides money to you that would be gained by the lawsuit? A. No, she didn't, she just mentioned money that I could get.
>
> Q. Is that the only thing that she talked to you about? A. That's the only thing I heard (App. 70).

[17] The possibility of undue influence was particularly great with Mrs. Williams as indicated by Appellant's testimony that she observed that Mrs. Williams had very little education (App. 99). Indeed, Appellant made an offer of proof that:

> Mrs. Williams has a reputation of being unstable in the community, and that she is changeable and subjective and takes one position, as he said, one day and another position the next (App. 206).

Nevertheless, Appellant sent her letter of August 30, 1973, disregarding the improper influence it could obviously have on Mrs. Williams.

> law suit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I sue maybe they will leave me alone, I'm tired of being bothered (App. 57).

The effects of the pressure, as indicated by Mrs. Williams, almost induced her to bring suit against her doctor, even though, as she subsequently notified Appellant, she did not want to sue Dr. Pierce—

> . . . I told her I didn't want any part, that I wasn't suing anybody because it didn't make sense. And I told her that the only way I would sue, bring a law suit against Dr. Pierce is that I did get pregnant[18] (App. 35).

The Disciplinary Rules

On August 12, 1969, the House of Delegates of the American Bar Association adopted the Code of Professional Responsibility. This Code, which was subsequently adopted by the South Carolina Supreme Court on May 1, 1973, included Disciplinary Rules 2-103(D)(5) and 2-104(A)(5), the rules which Appellant was found to have violated. The ABA's codes of professional responsibility, including the earlier Canons of Professional Ethics (1908) and the recent Code of Professional Responsibility (1970), historically have been key guidelines for the bar as a whole. The Code of Professional Responsibility (1970) as proffered by the ABA has been adopted by most state and local bar associations, legislatures, and courts.

[18] Mrs. Williams testified it was her desire then, as now, not to have any more children. Mrs. Williams further testified that Dr. Pierce had informed her for three months about the effects of the sterilization (App. 71).

In a subsequent lawsuit filed by the ACLU on behalf of two women for violation of their civil rights, *Doe v. Pierce, supra*, the ACLU sought damages of $1,500,000 from Dr. Pierce. The trial of that case resulted in a verdict of $5.00 in favor of one of the plaintiffs. The Court of Appeals reversed that verdict on the ground that the required state action was lacking. *Walker v. Pierce*, 560 F. 2d 609 (4th Cir. 1977).

The Proceedings Below

The complaint in the grievance proceeding was initiated on October 9, 1974, by John W. Williams, Secretary of the Board of Commissioners on Grievances and Discipline as Complainant. The complaint alleged that Appellant's letter of August 30, 1973, constituted solicitation in violation of the Canons of Ethics, and, therefore, Appellant was guilty of ethical misconduct (App. 3-4.). In answer to this complaint, Appellant filed a copy of her complaint in *American Civil Liberties Union and Jane Koe* v. *Bozardt,* Civ. No. 74-1703 (D.S.C.), an action filed by Appellant in the United States District Court seeking, *inter alia*, to enjoin the grievance board from making an inquiry into Appellant's conduct.[19]

[19] The Appellant has throughout these proceedings attempted to divert attention from her own conduct by making accusations against others. In *ACLU v. Bozardt, supra,* Appellant contended that the initiation, filing and processing of the grievance complaint was in violation of her rights under the First and Fourteenth Amendments; that the grievance proceeding was collaterally estopped by the proceedings in *Doe v. Pierce, supra,* or alternatively, that *Doe v. Pierce, supra,* was *res judicata* as to Appellant's ethical conduct; that the South Carolina Supreme Court has no authority to review Appellant's conduct before federal courts; that the complaint was initiated in bad faith and retaliation; that Rule 4(d) of the South Carolina Supreme Court's Rule on Disciplinary Procedure was vague and overbroad (App. 5-24). On December 23, 1974, the United States District Court dismissed the complaint (App. 222-240) for failing to state facts entitling plaintiffs to federal intervention, citing *Younger v. Harris*, 401 U. S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). The district court's decision was affirmed by the Court of Appeals, 539 F. 2d 340 (4th Cir. 1976), and certiorari was denied by this Court ____ U. S. ____, 97 S. Ct. 639, 50 L. Ed. 2d 623 (1976). Appellant renewed her allegations of bad faith and retaliation as a defense to the complaint in the grievance proceeding. However, Appellant made it clear that she was not alleging lack of good faith on the part of the Board of Commissioners on Grievances and Discipline in instituting these proceedings (App. 208), but rather on the part of those persons who forwarded the Appellant's letter to the Board. Although admitting that there was no statute of limitations which would restrict the review of her conduct (App. 209), Appellant felt that "timing" had something to do with whether there was a violation of professional ethics (App. 214). Apparently, Appellant's theory is that if an ethical violation is reported by an opposing attorney in other litigation, such reporting must be in bad faith or in retaliation. While noting initially that the South Carolina Attorney General's Office was not in fact acting adversely to Respondent in other litigation, since Appellant was not permitted by Mrs. Williams to bring suit, the Board of Commissioners on Grievances and Discipline and the South Carolina Supreme Court found a total lack of evidence to

substantiate Appellant's contentions (J.S.A. 7a). While Appellant has not presented this issue as a ground for appeal (J.S.A. 5), she has nevertheless attempted to reassert these arguments in her Brief (Appellant's Brief, pages 21, 22, 51 at fn. 1). Therefore, in order that Appellant's assertions do not remain unrefuted, a brief reply is necessary even though the issue is not properly before the Court.

The Appellant's letter to Mrs. Williams of August 30, 1973, came to the attention of defense attorneys in *Doe v. Pierce, supra*, on or about April 29, 1974, during a deposition of Eldon D. Wedlock, Jr. [There were nine attorneys involved in this particular deposition. Respondent's (Appellant's) Exhibit #2 to Panel Hearing, Deposition of Eldon D. Wedlock, Jr.). Dr. Pierce was represented by private counsel; the Attorney General's Office represented two state officials. The complaint against both of these state defendants was dismissed by the court prior to submission to the jury. *Walker v. Pierce*, 560 F. 2d 609 (4th Cir. 1977). Apparently, this letter had been in the possession of one attorney for Dr. Pierce for some time prior to the deposition. On May 10, 1974, a hearing was held in the United States District Court for the District of South Carolina at which time the Appellant's letter was brought to the court's attention by attorneys for the various defendants. The court granted permission to Dr. Pierce's attorneys to take depositions to discover the nature and extent of the solicitation. Several depositions were taken thereafter over a period of several months on the issue of solicitation, including the deposition of Shirley Brown, a plaintiff in *Doe*, on September 24, 1974, wherein Appellant maintains that Judge Blatt made a "favorable ruling" (App. 248) that no solicitation occurred. Appellant's contention that her letter was forwarded to the Board only after attempts to use it as a defense in the sterilization case were unsuccessful is absolutely incorrect, since as noted by Appellant the letter was forwarded to the Board on August 19, 1974 (Appellant's Brief, page 21), more than one month prior to Judge Blatt's "ruling." Finally, Appellant has maintained that Judge Blatt's "favorable ruling" of September 24, 1974, was never brought to the attention of the board. Appellee is not aware of what date the Board determined that a hearing should be held in regard to Appellant's conduct or even if a transcript had been made available by the court reporter prior to the issuance of the grievance complaint on October 9, 1974. Nevertheless, Appellant's contention that the "favorable ruling" was never brought to the board's attention is completely false because, indeed, it was brought vividly to their attention when the board members were served with Appellant's complaint in *ACLU v. Bozardt, supra*, on October 31, 1977 (App. 10). Regardless, Judge Blatt's comments were not a "favorable ruling" on the ethical considerations before the Board, as the District Court in *ACLU v. Bozardt, supra*, observed:

> This Court cannot follow the plaintiffs' contention that Judge Blatt in his comments quoted above from *Doe v. Pierce*, decided the issue of solicitation in such a manner that it has become *res judicata* or acts as a collateral estoppel binding upon either the Board or the Supreme Court of South Carolina.
>
> The recepient [sic] of the letter from Koe was not a party to that case. Plaintiff Koe did not represent any party in that action and was directly involved therein. There is no indication that she was questioned by the attorneys or by Judge Blatt. Certainly the Judge was not conducting a hearing as to possible disciplinary actions at the time he made his statement, which makes it clear that he was allowing questions as to solicitation, solely because it might go to the issue of the validity or appropriateness of the class action (App. 236-237).

On March 12, 1975, Appellant filed an Amended and Supplemental Answer, denying the allegations of solicitation, and alleging, *inter alia,* that her conduct was protected by the First and Fourteenth Amendments (App. 18). Appellant did not assert in her answer that the complaint failed to give her adequate notice of the misconduct charged, nor did she move to have the complaint made more definite and certain.

On March 20, 1975, this matter was heard before a panel of the Board of Commissioners on Grievances and Discipline.[20] At the opening of the hearing and prior to the introduction of any evidence, the chairman asked the attorneys for Appellant if Appellant was familiar with the charge in the complaint, to which Appellant replied in the affirmative (App. 28).

In fact, Judge Blatt indicated that he was only considering solicitation as it affected the merits of the case and not as ethical misconduct (App. 254), and he specifically indicated on three occasions that the ethics of Appellant's conduct was a consideration for a grievance committee (App. 255, 256, 257). The Appellant's contention that the forwarding of a possible ethical violation to a grievance committee by opposing counsel demonstrates bad faith or retaliation completely ignores a lawyer's duty under the Code of Professional Responsibility. DR 1-103 (A) provides:

> A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Appellant's allegations of bad faith and retaliation have absolutely no merit and are only intended to create a "smoke screen" to veil her misconduct by attempting to create an atmosphere of "official lawlessness," *Dembrowski* v. *Pfister*, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965), or of official oppression of certain types of litigation, *NAACP* v. *Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). The courts have long recognized the duty and responsibility of a lawyer as an officer of the court to bring misconduct of other attorneys, even opposing attorneys, to the attention of the court:

> When an attorney discovers a possible ethical violation concerning a matter before the court, he is not only authorized but is in fact obligated to bring the problem to that court's attention. [Citations omitted.] Nor is there any reason why this duty should not operate when, as in the present case, a lawyer is directing the court's attention to the conduct of opposing counsel. In fact, a lawyer's adversary will often be in the best position to discover unethical conduct. *In re Gopman*, 531 F. 2d 263 (5th Cir. 1976).

[20] The hearing was delayed until Appellant's action in federal court, *ACLU v. Bozardt, supra*, was resolved.

At the close of the complainant's case, Appellant moved to dismiss the Complaint (App. 77). In arguments on Appellant's motion, both disciplinary rules involved herein were published and argued (App. 80-82); Appellant did not maintain surprise or indicate in anyway that she was not aware of the disciplinary rules involved. In fact, Appellant presented two out-of-state witnesses for the purpose of testifying in her behalf as to these particular disciplinary rules (App. 168-169, 183-184).

On October 6, 1975, the Panel filed its Report finding Appellant guilty of misconduct in that she solicited a client on behalf of the American Civil Liberties Union (J.S.A. 6a). In particular, as to DR 2-103(D)(5), the Panel found that the ACLU, a non-profit organization that recommends, furnishes, and pays for legal services to individuals, has as a primary purpose the rendition of legal services, noting the testimony of Appellant's own witnesses (App. 188)[21] and the arguments of her Brief that the ACLU and its state affiliates on any given day are involved in several thousand active cases throughout the country (J.S.A. 10a). Moreover, the Panel found that the ACLU would derive financial benefit from the rendition of these legal services by its attorneys through court awards of attorney fees, which fees go to its central fund and are used among other things to pay the costs, salaries and expenses of its staff attorneys (J.S.A. 10).[22] The Panel concluded that it was improper for Appellant to recommend to Mrs. Williams that she retain the services of Appellant, her partners, or

[21] Mr. Charles Lambeth, who has served on the National Board of Directors of the ACLU testified that the ACLU does not represent individuals in every type of litigation, but only in litigation which the ACLU feels there is "sufficient movement."

[22] Mr. Lambeth testified that the attorney fees received by the ACLU are used for the benefit of the organization (App. 188). The Board of Directors of the ACLU primarily controls the finances of the organization and at meetings, the Directors discuss "everything that pertains to the operation of the business just like any other organization might" (App. 177).

associates who assist the ACLU. In regard to DR 2-104(A)(5), the Panel found that after Appellant had given unsolicited advice to Mrs. Williams, a lay person, as to her legal rights and remedies, Appellant solicited Mrs. Williams to join in a class action for money damages to be brought by the ACLU (J.S.A. 9a). The panel recommended that Appellant be given a private reprimand. On January 9, 1975, the full Board affirmed the Panel's findings of misconduct and recommendation for a private reprimand.

On July 27, 1976, the Appellant petitioned the South Carolina Supreme Court to review the grievance proceeding. On September 17, 1976, Appellant's petition was granted and thereafter briefs were submitted and oral arguments made to the court. On March 17, 1977, the South Carolina Supreme Court issued its Opinion affirming the Board's findings of misconduct,[23] but holding that Appellant's conduct was sufficiently aggravated so as to warrant a public reprimand.[24]

[23] Both the South Carolina Supreme Court and the Board of Commissioners on Grievances and Discipline were of the opinion that violations of the two disciplinary rules would also constitute conduct tending to bring the courts or the legal profession into disrepute. Rule on Disciplinary Procedure, Section 4(d), CODE OF LAWS OF SOUTH CAROLINA (1976), Vol. 22.

[24] It is well established in South Carolina, that the South Carolina Supreme Court has the ultimate responsibility to review all disciplinary proceedings. In *Burns v. Clayton*, 237 S. C. 316, 117 S. E. 2d 300 (1960), the court held that:

> [the members of the Board are] commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members of the bar of this state and of reporting to this court the proceedings of their inquiry, and their findings and recommendations; that the Board's report is advisory only, this Court being in nowise bound to accept its findings of fact or to concur in its recommendations; and upon this court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.

The complainant in grievance proceedings normally does not take a position as to the appropriate discipline to be imposed in a particular case (*See, e.g.*, App. 2). However, the court has on numerous occasions increased the discipline from that recommended by the Board. *See, e.g., In re* Irvine Belser, Opinion No. 20555, December 1, 1977 (private

SUMMARY OF ARGUMENT

The right of a state to regulate the practice of law within its borders in order to protect the public health, safety, and other valid interests is manifestly recognized. *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). The disciplinary rules in this case are not total prohibitions of solicitation by attorneys, but are narrowly-drawn regulations which seek to permit practices which may without adverse consequences enhance public awareness of the availability of legal counsel and contribute to the informed choice of counsel. In devising a satisfactory solution to this very complex problem, state regulatory authorities should be entitled to determine selectively whether particular instances of solicitation are harmful to the public and prohibit those practices. The regulation of the solicitation in this case is supported by a number of important state interests, which have been recognized historically by the profession, the courts, and even federal and state agencies.

Very simply the state's position in this case is that it has a legitimate and compelling interest in protecting the public against an attorney's inducement of an unwilling

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reprimand to public reprimand); *In re* John Lake, Jr., Opinion No. 20477, August 3, 1977 (indefinite suspension to disbarment); *In re* Billy R. Craig, Opinion No. 20452, June 13, 1977 (private reprimand to public reprimand); *In re* Winston W. Vaught, Opinion No. 20428, May 13, 1977 (private reprimand to public reprimand); *In re* Rogers Kirven, 267 S. C. 668, 239 S. E. 2d 899 (1977) (public reprimand to indefinite suspension); *In re* W. Richard James, 267 S. C. 474, 229 S. E. 2d 594 (1977) (public reprimand to indefinite suspension); *In re* Max B. Cauthen, *et al.*, 267 S. C. 448, 229 S. E. 2d 340 (1977) (public reprimand to indefinite suspension); *In re* John Felder, 265 S. C. 192, 217 S. E. 2d 225 (1975) (resignation to disbarment); *In re* Geddes H. Martin, 264 S. C. 1, 212 S. E. 2d 251 (1975) (resignation to indefinite suspension); *In re* R. Peter Julian, 260 S. C. 48, 194 S. E. 2d 195 (public reprimand to indefinite suspension); *In re* Dorothy V. Sampson, 259 S. C. 471, 192 S. E. 2d 859 (1972) (public reprimand to indefinite suspension); *In re* Albert A. Kennedy, 54 S. C. 463, 176 S. E. 2d 125 (1970) (public reprimand to indefinite suspension); *In re* C. M. Benedict, III, 254 S. C. 481, 175 S. E. 2d 897 1970) (indefinite suspension to disbarment).

citizen, already aware of her legal rights, to file suit against another private citizen. The Appellant takes the position that no possible harm can result from such solicitation, if the legal services are to be rendered without a fee. In response to this, no better argument can be advanced than the one presented by the prospective client in this case:

> I got tired of everybody aggravating me. Everybody was coming to ask me wasn't I going to sign to file a law suit. And after I had said a hundred times I didn't want to sue then I got the notion that maybe if I sue they will leave me alone, I'm tired of being bothered. (App. 57).

The First Amendment does not protect the right of an attorney to stir up unnecessary and unwanted litigation. The role of an attorney as an officer of the court is to settle disputes between private citizens; he should not assume the role of provoking such disputes. While litigation against government may be an appropriate method for the citizenry to make its views known to government, the Court has in the past recognized the harm that derives from causing dissention among neighbors, especially in instances where established relationships will be disrupted, as in this case that of a doctor and his patient. *NAACP v. Button,* 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Moreover, the state has a legitimate interest in insuring that those who resort to the courts have a pressing personal need and are not induced by an attorney to bring litigation merely for the prospects of financial reward, or because of other undue influence, harassment or overreaching. Furthermore, attorneys have no First Amendment rights to secure clients in order to assert a cause that the attorney desires to litigate. The state's interest in regulating such conduct becomes especially significant in the context of legal services organizations which otherwise have no standing to bring suit.

In determining which practices should be allowed, the states are obviously concerned with preventing false and misleading solicitation, as well as communications which confuse or fail to inform. Such communications have never been protected under the First Amendment. *Va. Pharmacy Bd. v. Va. Consumer Council,* 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). In *Bates v. State Bar of Arizona,* —— U.S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 836 (1977), the Court noted the inherently misleading nature of in-person solicitation which might warrant restriction. The misleading nature of solicitation follows from human nature, *i.e.,* the instinct to promote one's better qualities while concealing one's faults. Therefore, solicitation provides a very imperfect foundation for the prospective client to select an attorney. Furthermore, some attorneys may purposefully conceal potential conflicts of interest with the prospective client as, for example, conflicts of the attorney *vis-a-vis* the client in the aims and purposes of the proposed litigation.

But these are not the only concerns of the state. The state has the right to protect its citizens from unwarranted invasion of their privacy—a constitutional right as important as free speech. Furthermore, certain methods of providing information concerning legal services may affect the quality and nature of these services, may affect the costs of such services, may have an adverse effect on the administration of attorney discipline, and indeed even adverse consequences for the judicial system.

Even if the Court should find that Appellant's activities are afforded some protection under the First Amendment as commercial speech, the state's legitimate and compelling interests outweight the attorney's right to offer his services by soliciting clients. The Appellant reluctantly acknowledges the need for regulation in certain instances of solicitation by attorneys, but focuses on what she characterizes as the "overbreadth" of the ABA's Code of Professional Responsibility. The Court, however, has refused to apply the overbreadth doctrine to commercial speech. *Bates v. State Bar of Arizona, supra.*

Appellant's contention that she was not given adequate notice of the misconduct charged is not supported by the record. Appellant was advised of the facts upon which the claim of misconduct was based. She made no objection to the charges as stated in the complaint and even affirmatively stated that she was prepared to go forward with the hearing. The record amply supports the finding of the South Carolina Supreme Court that Appellant's conduct was clearly prohibited by its disciplinary rules.

ARGUMENT

I

The Ethical Standards do not conflict with First Amendment Rights and are justified by a compelling state interest.

Mr. Justice Cardozo, in reviewing the conduct of a member of the New York bar, made the following succinct observation:

> Membership in the bar is a privilege burdened with conditions. . . [This attorney] was received into that ancient fellowship for more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice. *People* v. *Culkin,* 248 N.Y. 465, 470-471, 162 N.E. 487, 489 (1928).[25]

The earliest pronouncements of legal jurisprudence have recognized the wisdom, and indeed, the absolute necessity for courts to possess authority to control the conduct of its officers and to remove from the profession those persons

[25] Quoted with approval by Justice Frankfurter in *Theard* v. *United States,* 354 U. S. 278, 281, 77 S. Ct. 1274, 1276, 1 L. Ed. 2d 1342, 1344 (1957).

whose conduct has proved them unfit to be entrusted with the duties and responsibilities belonging to the office of an attorney.[26] *See, Ex parte Wall,* 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1883). Likewise, this Court has recognized from its earliest decisions that the right to control the practice of law in the state courts is vested in the states. *Bradwell* v. *Illinois,* 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1873); *Ex parte Lockwood,* 154 U. S. 116, 14 S. Ct. 1082, 38 L. Ed. 929 (1894). More recently, this Court again had occasion to reassert the dominant role of the states in regulating the legal profession:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." [citations of authority omitted]. The interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been officers of the court. *Goldfarb* v. *Virginia State Bar,* 421 U. S. 773, 792, 95 S. Ct. 2004, ——, 44 L. Ed. 2d 572, 588 (1975).

In South Carolina, as in most states, the authority to regulate the legal profession is vested in the state Supreme Court.[27] Pursuant to this responsibility, the South Carolina

[26] In *Cohen* v. *Hurley,* 366 U. S. 117, 123-4, 81 S. Ct. 954, ——, 6 L. Ed. 2d 156, 162 (1961), the Court recognized that English and American courts have possessed for centuries the authority to exercise disciplinary powers over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied.

[27] Section 40-5-10, CODE OF LAWS OF SOUTH CAROLINA, 1976, recognizes the inherent authority of the South Carolina Supreme Court to discipline attorneys in South Carolina.

Supreme Court has promulgated a code of conduct with attendant disciplinary rules entitled, "The Rule on Disciplinary Procedure for Attorneys."[28]

Traditionally, the courts have prohibited solicitation of legal business by attorneys.[29] Justifications for such prohibitions have on occasion been noted by this Court:

> It is certainly not beyond the realm of permissable state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court. . . *Cohen* v. *Hurley,* 366 U. S. 117, 124, 81 S. Ct. 954, ——, 6 L. Ed. 2d 156, 162 (1961).

And again in its last Term, this Court noted:

> [We] also need not resolve the problems associated with in-person solicitation of clients- at the hospital room or the accident site, or in any other situation that breeds undue influence- by attorneys or their agents or "runners." Activity of that kind might well pose dangers of overreaching and misrepresentation not encountered in newspaper announcement advertising. *Bates* v. *State Bar of Arizona,* ——U.S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 825 (1977).

In promulgating the Code of Professional Responsibility (1970), the American Bar Association provided narrowly-drawn disciplinary rules which dictate "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[30] The disciplinary rules involved in the instant case were specifically drawn to conform to this Court's pronouncements on the issue of solic-

[28] *See,* Volume 22, CODE OF LAWS OF SOUTH CAROLINA, 1976. Pursuant to section 4(b) of the Rule, the court adopted on May 1, 1973, the Code of Professional Responsibility of the American Bar Association (1970).

[29] Barratry, maintenance and champerty were offenses at common law. Canons 27 and 28 of the ABA's Canons of Professional Ethics (1908) continued this prohibition.

[30] Preliminary Statement, Code of Professional Responsibility (1970).

itation of legal business.[31] Therefore, the constitutional question is approached from two standpoints, first, the prior decision of the Court, and second, the compelling state interests which warrant these disciplinary rules.

A. **Prior Decisions**

We start by recognizing at the outset that solicitation of legal business is not wholly outside the area of freedoms protected by the First Amendment. *NAACP* v. *Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). But certainly, Disciplinary Rules 2-103(D) and 2-104(A) are not absolute bans on all solicitation of legal business, nor, as Appellant contends, an absolute ban on all offers of free legal assistance.[32] Viewed strictly from the standpoint of case law, the prior decisions of this Court have recognized the compelling and legitimate state interest in proscribing solicitation.

Appellant relies primarily on the Court's decision in *NAACP* v. *Button* to support her arguments of First Amendment protection. However, a reading of that case demonstrates that the Court's decision proffers no such protection to Appellant.[33] In *Button*, the Court reviewed the constitutionality of a Virginia criminal solicitation statute which had been amended and broadened in 1956 to threaten the civil rights group activities of the NAACP.[34] This Court placed importance on the type of legal actions undertaken by the NAACP in holding that the First Amendment afforded some protection to orderly group

[31] *See, e.g.*, DR 2-103(D)(5), Code of Professional Responsibility (1970), fn. 123.

[32] Appellant's Brief, page 41.

[33] It is apparent that the Court's holding did not grant a blanket exemption to the NAACP, its affiliates and legal staff, from State regulation of the legal profession, but rather extended such protection only for their activities as shown on the record. NAACP v. Button, 371 U. S. 415, 428-9, 83 S. Ct. 328, _____, 9 L. Ed. 2d 405, 415 (1963).

[34] *Id.* at 423, 435-36, 445-57, 83 S. Ct. 328, _____, 9 L. Ed. 2d 405, 412, 419, 425-26 (1963).

activities whereby minorities seek through lawful means to achieve legitimate policital ends:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all governments, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. . . .[35]

In so holding, the Court made the following findings in regard to the record before it:

1. The NAACP limited its sponsorship of law suits to actions against government and did not involve itself in essentially private litigation for damages;[36]
2. There were no monetary stakes involved in NAACP sponsored litigation and their legal staff had no financial interest in the litigation since they received neither salary nor retainer;[37]
3. There were no potential conflicts of interest between the NAACP and its members and non-members because no monetary stakes were involved and because their aims and interests were identical;[38]
4. There was no evidence that the NAACP participated in or managed the actual conduct of litigation;[39]
5. There was no evidence that the NAACP had overreached any potential client by attempting to persuade the clients to bring the lawsuit through undue pressure or harrassment;[40] and
6. The NAACP was drawn into litigation either through requests directly from the aggrieved party or through authorization forms signed at meetings held by the NAACP and voluntarily attended by members and non-members.[41]

[35] *Id.* at 430, 83 S. Ct. at _____, 9 L. Ed. 2d at 416.

[36] *Id.* at 420, 441, 93 S. Ct. at _____, 9 L. Ed. 2d at 441, 423.

[37] *Id.* at 420, 443, 83 S. Ct. at _____, 9 L. Ed. 2d at 411, 424.

[38] *Id.*

[39] *Id.* at 433, 83 S. Ct. at _____, 9 L. Ed. 2d at 418. Moreover, in the context of the NAACP's activities, the aims and interests of the NAACP and non-member clients were identical, *i.e.*, equality of treatment of members of the American Negro community.

[40] *Id.* at 422, 433, 83 S. Ct. at _____, 9 L. Ed. 2d at 412, 418.

[41] *Id.* at 421, 83 S. Ct. at _____, 9 L. Ed. 2d at 411.

The Court concluded that the statute was unconstitutional, not because it prohibited particular acts of solicitation, but because it proscribed any arrangment by which prospective clients were advised to seek the assistance of particular counsel. Thus, the Virginia statute was so vague and overboard as to potentially ban even the simple referral or recommendation of *any* lawyer including attorneys outside the NAACP's legal staff. In the last analysis, the Court in *Button,* found that the NAACP's activities as established by that record fell within the First Amendment protection and that the state failed to advance any compelling state interest warranting the regulation of those activities.[42]

In three subsequent cases the Court considered the question of recommendation of particular attorneys in the context of "collective activity" undertaken by unions for the benefit of its members. [43] The issue before the Court was not whether law suits were being cultivated by attorneys, but rather whether an association can exist for the purpose of facilitating the securing or asserting of the legal rights of its members. The unions were not a politically impotent group, and, therefore, were not using the courts as a means of "policital expression" as in *Button.* Litigation as a form of speech was only considered as appurtenant to the freedom of association. The real concern of the court in the union cases was the protection of the First Amendment right to undertake collective activity in order to obtain meaningful access to the courts.[44] The Court noted that:

[42] NAACP v. Button, 371 U. S. 415, 444, 83 S. Ct. 328, _____, 9 L. Ed. 2d 405, 424 (1963).

[43] Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, 84 S. Ct. 1113, 12 L. Ed 2d 89 (1964); United Mine Workers v. Illinois Bar, 389 U. S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967); United Transportation Union v. Michigan, 401 U. S. 576, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971).

[44] United Transportation Union v. Michigan, 401 U. S. 576, 585, 91 S. Ct. 1076, _____, 28 L. Ed. 2d 239, 247 (1971).

1. The unions' activities facilitated the securing of benefits to which by statute the union members were already entitled;[45]
2. The unions received no financial benefit from the litigation;[46]
3. There was no potential conflict of interest between unions and their members;[47]
4. There was no evidence that the unions participated in or managed the actual conduct of litigation;[48]
5. There was no overreaching or harassment of union members;[49] and
6. Attorneys selected or retained by the unions did not solicit business.[50]

The Court again concluded that the state had failed to set forth a compelling interest to warrant restriction of the group legal action demonstrated by the records in those cases.

Of primary importance to the Court in *NAACP v. Button, supra,* and its progeny, was the fundamental right of individuals to receive information regarding their legal rights and appropriate means for effectuating those rights. However, the Court in each case explicitly stated that its decision was based only upon the record before the Court,

[45] *Brotherhood of R. Trainmen* and *United Transportation Union* involved union activities in suits under the Federal Employers Liability Act (FELA), and *United Mine Workers* involved similar union activities relating to claims under state workmen's compensation acts.

[46] Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, at footnote 9, 84 S. Ct. 1113, _____, 12 L. Ed. 2d 89, 93 (1964); United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217, 221, 88 S. Ct. 353, _____, 19 L. Ed. 2d 426, 430 (1967); United Transportation Union, 401 U. S. 576, 582-83, 91 S. Ct. 1076, _____, 28 L. Ed. 2d 339, 345 (1971).

[47] See, United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217, 224, 88 S. Ct. 353, _____, 19 L. Ed. 2d 426, 432 (1967).

[48] Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, 6-7, 84 S. Ct. 1113, _____, 12 L. Ed. 89, 93 (1964); United Mine Workers v. Illinois State Bar Assn., 389 U. S. 217, 219-20. 88 S. Ct. 353, _____, 19 L. Ed. 2d, 426, 429 (1967); United Transportation Union v. Michigan, 401 U. S. 576, 581, 91 S. Ct. 1076, _____, 28 L. Ed. 2d. 339, 344 (1971).

[49] *See,* United Mine Workers v. Illinois Bar Assn., 389 U. S. 217, 220, 225, 88 S. Ct. 353, _____, _____, 19 L. Ed. 2d 426, 429, 432 (1967).

[50] *See,* Brotherhood of R. Trainmen v. Virginia, 377 U. S. 1, 7, 84 S. Ct. 1113, _____, 12 L. Ed. 2d 89, 93 (1964).

implicitly recognizing that different group activities might warrant proper state regulation. Therefore, in order to place this case in perspective with prior decisions of the Court, some comparison of the facts and the group activities involved is necessary.[51]

The disciplinary rules in this case, unlike the Virginia statute in *NAACP v. Button,* are not censorial rules directed at a particular group or viewpoint. Rather, the rules seek to regulate attorney conduct in an even-handed and neutral manner. *Broadrick v. Oklahoma,* 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). Moreover, the American Civil Liberties Union in seeking to advance its views of civil liberties is not a politically impotent group.[52] The ACLU's chief efforts in the area of civil liberties are exerted in the courts,[53] normally on behalf of individuals who are not members of the union.[54] Therefore, the concept of "collective activity" undertaken by union members to assist each other in asserting their legal rights as expounded in prior decisions of the Court applies weakly if at all in this case. The Appellant's letter of solicitation did not propose a lawsuit against government as in *NAACP v. Button,* but an action for money damages against the prospective client's private physician. Although the lawsuit

[51] Appellee will show *infra,* Part B, that the state does have a compelling state interest in regulating the activity of Appellant involved in this case.

[52] "The ACLU's prestige as a non-partison defender of civil rights has enabled it to command free legal talent and extensive publicity through which it has exercised an influence far out of proportion to its small membership and limited expenditures." *Private Attorneys-General: Group Action In The Fight For Civil Liberties,* 58 Yale L. J. 574, 575-6 (1949). The Appellant notes that the ACLU presently has more than 250,000 members in 49 state-wide affiliates and 379 local chapters (Appellant's Brief, page 26).

[53] *Id.* at 576. Although the ACLU does lobby and provide educational programs for the public, its main efforts traditionally have been through litigation. Appellant maintained in her arguments before the Hearing Panel that the ACLU was involved in an extensive program of litigation, and on any given day, the ACLU and its state affiliates are involved in several thousand active cases throughout the country. J.S.A. 10a.

[54] The potential client in this case, Mrs. Williams, was not a member of the ACLU.

might be of public interest, it was, very simply, private litigation. While this Court has extended First Amendment protection to certain types of private litigation, it has only done so in the context of collective activity, *i.e.,* group legal services to members. Certainly, the Court in *Brotherhood of R. Trainmen, United Mine Workers, and United Transportation Union, supra,* did not hold, as argued by Appellant, that unions could solicit the legal business of individuals outside the union membership. Moreover, the Court in the "union" cases was concerned only with solicitation of legal business by non-lawyers. Recently, this court acknowledged that different considerations would apply for solicitation of legal business by lawyers. *Bates v. State Bar of Arizona,* —— U. S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810 (1970). The record in the instant case clearly establishes different activities and conduct by Appellant than that involved in prior decisions of this court:

1. Appellant sought to solicit private litigation on behalf of the ACLU from an individual who was not a member of the union;
2. The ACLU would derive financial benefit from the proposed law suit in the form of court awarded attorneys' fees; in addition, Appellant derived personal financial gain from "foundation" support for her involvement in "public interest" litigation;
3. There was a conflict of interest in the aims and interests of the ACLU and the non-member potential client, because there were monetary stakes and because the prospective client's primary interest in money damages would potentially conflict with the ACLU's interest in establishing new civil liberty precedents of broad effect;
4. The ACLU, as a legal services organization, does participate in the actual conduct of the litigation;
5. There was substantial overreaching, misleading, and undue influence by Appellant in attempting to in-

duce the potential client to allow the ACLU to file suit; and

6. The solicitation invaded the privacy of the home.[55] The Appellee finds no fault in Appellant's conduct in meeting with the women to advise them of their legal rights, even if such advice was unsolicited.[56] There is no doubt that such activity is protected under the First Amendment. *NAACP* v. *Button, supra.* Moreover, this Court has recognized the First Amendment concern that aggrieved parties know how to effectuate their legal rights. *Bates* v. *Arizona State Bar, supra.* We do not disagree with that fundamental principle. The record amply establishes that Mrs. Williams received information protected by the First Amendment when she met with Appellant in July, 1973. Appellant talked at length with Mrs. Williams about her case (App. 93), informed her of her legal rights (App. 109) and remedies (App. 31, 110, 111) and even advised her that the ACLU was an organization that could render legal service to her (App. 131). Having been so informed, Mrs. Williams was in a position to make an informed, independent decision of her own best interests.[57]

Appellant's letter of August 30, 1973, one month after the July meeting, did not provide any additional information to Mrs. Williams. The letter was intended solely for the purpose of persuading or pressuring Mrs. Williams to bring a law suit and to allow the ACLU to handle the case.

[55] These points will be discussed in detail in Part B, *infra.*

[56] DR 2-104(A) recognizes that unsolicited advice may be offered by an attorney.

[57] The theory of free speech is grounded on the belief that people will make the right choice if presented with all points of view on a controversial issue. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 881 (1963); *see also*, Capitol Broadcasting Company v. Mitchell, 333 F. Supp. 582 (D. C. 1971), *aff'd sub nom.*, Capitol Broadcasting Co. v. Acting Attorney General, 405 U. S. 1000 (1972); Va. Pharmacy Bd. v. Va. Consumer Council, 425 U. S. 748, 770, 96 S. Ct. 1817, ——, 48 L. Ed. 2d 346, 363 (1976).

It was because of the August letter, not the July meeting, that the South Carolina Supreme Court found that Appellant had violated its disciplinary rules. By Appellant's own admission at the disciplinary hearing, she was seeking members of the plaintiff class as clients for the ACLU (App. 136-7). The inquiry thus becomes: May an attorney, after having informed a layman of his legal rights and the means for effectuating those rights, thereafter attempt to induce or persuade that person to bring a law suit and to allow that attorney, his firm or organization (even though the party solicited is not a member) to handle the litigation? To answer this question in the affirmative would be tantamount to establishing, on a constitutional level, a right of an attorney to litigate.[58] The result would not only destroy the longstanding rules and concepts forbidding the solicitation of legal business, but would also destroy, erode, or bring into serious doubt all rules and concepts heretofore based upon the traditional attorney-client relationship.[59] But just as there is no constitutional right as such to practice law, *Theard* v. *United States,* 354 U. S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1957); *Konigsberg* v. *State Bar of California,* 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961), there is no First Amendment right of attorneys to litigate. To protect the "right" of an attorney to persuade or pressure a prospective client into permitting the attorney to file a law suit on the client's behalf, as contended by Appellant, would **not** in effect foster in-

[58] Of course, such a ruling would be a completely unwarranted extension of prior rulings of the Court which viewed the right of association and the right of vigorous advocacy only from the standpoint of the aggrieved party.

[59] *See, e.g.,* ABA's Code of Professional Responsibility (1970), DR 2-105 (Limitation of Practice); DR 2-109 (Acceptance of Employment); DR 2-110 (Withdrawal from Employment); DR 3-101, *et seq.* (Aiding Unauthorized Practice of Law); DR 4-101 (Preservation of Confidences and Secrets of a Client); DR 5-101, *et seq.* (Conflict of Interest); DR 6-101 (Competency); DR 7-101, *et seq.* (Representing Client Zealously within the Bounds of the Law).

formed, independent decision making, but rather would hinder it. Prospective clients would select lawyers on the basis of who gets there first, or who makes the most attractive sales pitch, or as in this case, he may be tempted to bring the law suit to get rid of the annoying attorney.[60] Appellant contends, nevertheless, that the First Amendment protects the solicitation of legal business if the services will be rendered **free,**[61] as opposed to soliciation of legal services **for a fee.**[62] But if one starts from the basic premise that the First Amendment protects the right to receive information and ideas, *Bigelow* v. *Virginia,* 421 U. S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975); *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U. S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976), then such protection would exist regardless of whether the solicitation of legal services is for a fee or not. In other words, gain has little importance in the First Amendment area. *New York Times Co., v. Sullivan,* 376 U. S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *Bigelow* v. *Virginia, supra; Va. Pharmacy Bd.* v. *Va. Consumer Council, supra.* Therefore, if, as Appellant argues, the First Amendment protects the right of an attorney to solicit legal business, it does so regardless of whether the legal services are free or for a fee.

[60] Mrs. Williams testified that she almost decided to bring suit for this reason. (App. 57).

[61] Appellant's Brief, page 41.

[62] Appellant does not define "free" legal services. She does acknowledge that the ACLU normally seeks court awards of attorney fees which are used for the benefit of the organization including its staff attorneys (App. 188). Apparently, therefore, legal services are "free" if paid by the opposing party rather than the ACLU's client. Under this definition, contingency fee cases would be "free" since in reality the fee is also being obtained out of damages paid by the opposing party.

Moreover, although Appellant presented testimony that awards of attorney fees encourage attorneys to undertake cases involving civil liberties because of the promise of financial reward (App. 174), she takes the somewhat incongruous position that the motive of financial gain was not present in this case. *Amici* Public Citizen and the National Resource Center for Consumers of Legal Services state that under current ACLU policies, cooperating attorneys may retain court-awarded attorney fees. (Brief, page 14, at footnote 8.)

If any First Amendment argument can be asserted by Appellant, it must be that solicitation of legal business is protected by the First Amendment as "commercial speech." This Court has for many years debated and struggled with the difficult and perplexing question of what protection is afforded to "commercial speech." Starting from a basis that commercial speech was outside the protection of the First Amendment, *Valentine* v. *Chrestensen,* 316 U. S. 52, 62 S. Ct. 920, 86 L. Ed. 1262 (1952), the Court attempted in its later decisions to temper *Valentine* at first by distinguishing "commercial" advertisements from "editorial" advertisements, *New York Times* v. *Sullivan, supra,* and then by holding that the First Amendment protected commercial advertisements which contained a clear "public interest." *Bigelow* v. *Virginia, supra.* Finally, in *Va. Pharmacy Bd.* v. *Va. Consumer Council, supra,* this Court held that the First Amendment even protects commercial speech, which does nothing more than propose a commercial transaction to the public, again noting the traditional concern that people be better informed in order to perceive their own best interests. However, the Court has recognized that not all speech is protected, specifically finding that untruthful and misleading speech,[63] and speech proposing unlawful conduct have never been protected. *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U. S. 748, 771-3, 96 S. Ct. 1817, ——, 48 L. Ed. 2d 346, 364-5 (1976); *Konigsberg* v. *State Bar of California, supra.* The facts of this case do not support Appellant's contention that her August 30, 1973, letter informed Mrs. Williams of her legal rights or in fact that it provided Mrs. Williams with any information that Appellant had not already given her. On the other hand, the record amply demonstrates that the purpose of the let-

[63] Appellant's letter of solicitation is not protected under the First Amendment because it was misleading to Mrs. Williams. *See,* Part B, paragraph 4, *infra.*

ter was merely to secure a client. Since it conveyed neither ideas or information, her conduct in writing the letter did not promote informed decision-making. As with untruthful or misleading statements concerning legal services, solicitation intended to unduly influence or overreach should not be afforded protection under the First Amendment.

In its last Term, the Court applied its holding in *Va. Pharmacy Bd.* to advertising of routine legal services by lawyers. *Bates* v. *State Bar of Arizona*, —— U. S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810 (1977). However, there is a very real difference between **public** commercial advertising of legal services and **personal** solicitation of legal services. Advertising conveys information of public interest to a diverse audience; personal solicitation, on the other hand, carries personal information, which may or may not be desired or wanted. Moreover, solicitation, unlike public advertising, involves the invasion of privacy of others. *Breard* v. *Alexandria*, 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), and results in the solicitor's message being thrust upon the prospective client as a captive audience. *Lehman* v. *City of Shaker Heights*, 418 U. S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974). Solicitation, therefore, involves more than speech. It also involves **conduct**; it is speech **plus**. *NAACP* v. *Button*, 371 U. S. 415, 455, 83 S. Ct. 328, ——, 9 L. Ed. 2d 405, 431 (1963) (Justice Harlan dissenting). As the court in *Lehman* observed:

> Although American constitutional jurisprudence, in the light of the First Amendment, has been jealous to preserve access to public places for purposes of free speech, the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded by the

> Amendment to the speech in question. *Id.* at 302-3, 94 S. Ct. 2714, ——, 41 L. Ed. 2d 770, 777.[64]

The First Amendment, therefore, does not grant an attorney, or anyone, the right to spread his commercial message to a captive audience. In *Va. Pharmacy Bd., supra,* and *Bates, supra,* the Court reaffirmed time, place, and manner restrictions in the context of advertising for professionals. Moreover, in *Bates, supra,* the court specifically recognized the necessity for such restrictions in regard to solicitation of clients.[65] Even if, as Appellant contends, the ACLU's legal activities are similar to those of the NAACP in *NAACP* v. *Button, supra,* that decision did not permit the method of solicitation used in this case, *i.e.,* a personal letter of solicitation written to the prospective client at her home. In *Button,* the NAACP secured clients in two ways: first, through requests directly from the aggrieved party, and secondly, through meetings held by the NAACP and voluntarily attended by its members. Such methods are obviously less obtrusive and do not violate the individual's privacy. In *Rowan* v. *United States Post Office,* 397 U. S. 728, 736, 90 S. Ct. 1484, ——, 25 L. Ed. 2d 736, 742-3 (1970), the Court stated:

> [T]he right of every person "to be let alone" must be placed in the scales with the right of others to communicate.

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[64] *See also,* Cox v. New Hampshire, 312 U. S. 569, 61 S. Ct. 762, 85 L. Ed. 1049 (1941) (parades and processions on public roads); Breard v. Alexandria, 341 U. S. 662, 71 S. Ct. 920, 95 L. Ed. 1233 (1951) (door-to-door salesmen); Poulos v. New Hampshire, 345 U. S. 395, 73 S. Ct. 760, 97 L. Ed. 1105 (1953) (public park); Adderly v. Florida, 385 U. S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966) (jailhouse); Columbia Broadcasting v. Democratic National Committee, 412 U. S. 94, 93 S. Ct. 2080, 36 L. Ed. 2d 772 (1973) (broadcasting facilities).

In *Olmstead v. United States,* 277 U. S. 438, 478, 48 S. Ct. 564, ——, 72 L. Ed. 944, 956 (1928), the Court observed that the makers of the Constitution in undertaking to secure conditions favorable to the pursuit of happiness conferred upon the citizens "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men."

[65] Bates v. State Bar of Arizona, —— U. S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 825 (1977).

> In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. . . . It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive.
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> • • •
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> Nothing in the Constitution compels us to listen or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail. The ancient concept that "a man's home is his castle" into which "not even the king may enter" has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another.

Thus, the Appellant, even if protected under *Button*, was restricted by the disciplinary rules, which specifically incorporated the prior decisions of the Court, to the same method of solicitation.[66] As previously noted, Appellant completely advised Mrs. Williams of her rights at the July meeting and even informed her that the ACLU was an organization that could render the legal services to her (App. 131). When Mrs. Williams informed Appellant that she would call Appellant if she needed a lawyer (App. 74), Appellant should have ceased her efforts to secure Mrs. Williams as a client. Her subsequent letter of August 30, 1973, violated the disciplinary rules which limit the methods of recommending a particular lawyer and is outside the scope of the First Amendment.

[66] DR 2-103(D) (5) provides for solicitation on behalf of legal services organization "only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services. . . ."

B. Compelling State Interests

Freedom of speech and association as protected by the First and Fourteenth Amendments are not "absolutes," and whenever these constitutional protections are asserted against the exercise of valid governmental powers, the Court must weigh the respective interests involved. *Konigsberg* v. *State Bar of California*, 366 U. S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961). Therefore, we must determine by a "balancing act" whether a legitimate and compelling state interest outweighs the alleged harm to the furtherance of a potential freedom. *NAACP* v. *Button*, 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). If the Court should find that Appellant's solicitation falls within the scope of the First Amendment, her conduct must be considered "commercial speech" and not "pure speech" as contended by Appellant. The solicitation in this case involved neither editorial criticism of the legal system, *Bridges* v. *California*, 314 U. S. 252, 62 S. Ct. 190, 86 L. Ed. 192 (1941), nor a public demonstration of protest, *Cox* v. *Louisiana*, 379 U. S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965), it was, in the light most favorable to Appellant, merely a proposal of a commercial transaction. *Va. Pharmacy Bd.* v. *Va. Consumer Council*, 425 U. S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976); *Bates* v. *State Bar of Arizona*, —— U. S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 310 (1977). As Appellant characterized her own conduct, she was seeking members of a plaintiff class as clients for the ACLU (App. 136-7).

The Court's concern that aggrieved parties have information regarding their legal rights and the means for effectuating those rights has not gone unnoticed by the bar.[67] Many programs, such as lawyer referral services and legal aid offices, have been created to meet these needs.

[67] *See, e.g.*, Bates v. State Bar of Arizona, ——U. S.——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 832, fn. 22 (1977).

Likewise, last term in *Bates, supra,* this Court gave First Amendment protection to advertising of routine legal services by attorneys, which will increase the information available to the public in regard to legal services. But, as the Court in *Goldfarb* v. *Virginia State Bar, supra,* noted,[68] not all forms of competition usual in the business world are appropriate in a profession. Moreover, the state, in attempting to preserve the quality of legal services rendered by attorney as well as protecting the public's safety and welfare, should be allowed reasonable opportunity to experiment with solutions to providing better information to the public about legal services through means other than personal solicitation. *See, Young* v. *American Mini Theaters,* 427 U. S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976). We therefore turn to the compelling state interests which justify the restraints on personal solicitation of legal business.

1. Undue Influence and Overreaching[69]

Solicitation by lawyers will encourage people to select lawyers for the wrong reasons, *i.e.,* reasons not related to competence and integrity of the lawyer being selected. Thus, as previously noted, parties may select a lawyer on the basis of who gets there first or who makes the best sales pitch. Moreover, people may decide to undertake legal services they do not need and cannot afford because of high pressure tactics, or even to get rid of an annoying attorney. It is the State's position that a lawyer should not be retained as the result of hucksterism normally attendant to the sale of a vacuum cleaner. In *Bates,* the Court specifically recognized the problem of undue influence bred by

[68] 421 U. S. 773, 792, 95 S. Ct. 2004, ——, 44 L. Ed. 2d 572, 585 (1975).

[69] "Overreaching" refers to the aggressive competition among lawyers for clients which leads to lawyers approaching clients at times when the client is in no condition to properly consider retention of a lawyer.

personal solicitation.[70] The experience of the business world supports this concern. In 1970, the Federal Trade Commission held hearings as the result of "substantial" complaints arising out of the "home solicitation sale."[71] Consumer complaints fell within five basic areas:

> (1) Deception by salesmen in getting inside the door;
> (2) high pressure sales tactics;
> (3) misrepresentation;
> (4) high prices for low quality merchandise; and
> (5) the nuisance created by the visit to the home by an uninvited salesman;[72]

In regard to the high pressure sales tactics, the hearing officer found:

> High pressure sales tactics are the leading cause for consumer complaints about door-to-door selling. The use of such tactics is of course present in all forms of selling. The door-to-door sale, however, seems to be particularly susceptible to the use of these tactics. While various forms of misrepresentation may be utilized in the door-to-door sale, high pressure sale techniques are almost always used. This explains the high degree of success of the glib, fast-talking, and persistent door-to-door salesmen in selling a product which the customer often does not want, or does not need, or cannot afford.[73]

While badgering and physical coercion have sometimes been used in solicitation, the use of more subtle or sophisticated techniques of psychological coercion are equally effective.[74] Moreover, the context of the personal solicitation is more conducive to undue influence, since such solicitation takes place in the home, in the hospital, at the scene of

[70] Bates v. State Bar of Arizona, ——U. S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 825 (1977).

[71] *See,* 37 Fed. Reg. 22934 (1972).

[72] *Id.* at 22937.

[73] *Id.* at 22937-8.

[74] *See, The Direct Selling Industry: An Empirical Study,* 16 U.C.L.A. Law Review 890, 895 (1969).

accident, or other locations where the client cannot easily leave and must take affirmative action to relieve himself of the attorneys' presence.[75] Minority groups, indeed the very group the First Amendment seeks most to protect, are the most susceptible group to pressure tactics.[76] Because personal solicitation results in a captive audience, it deprives the "consumer" of the right to reflect, compare, decide, and if desired, walk away. Moreover, personal solicitation at home or at other places where pressure tactics are prevalent normally results in excessive prices for the goods or services rendered[77]—a fact deemed undesirable by the Court in *Bates*.[78]

The record in this case establishes the pressure being placed upon Mrs. Williams to file suit. Certainly, Appellant's emphasis on money damages both in her initial interview and subsequent letter was calculated for its psychological effect on Mrs. Williams, a poor and uneducated individual (App. 70).[79] The letter was received at her home during a time when her child was critically ill in the hospital, a fact that Appellant was aware of (App. 42) and which would obviously make informed decision-making more difficult.[80] The pressure on Mrs. Williams almost resulted in her filing suit to keep from being "bothered" (App. 57).

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[75] *Id.* at 896.

[76] *Id.* at 922. The FTC hearing officer also concluded that high and middle income consumers are also prime targets for personal solicitation.

[77] 37 Fed. Reg. 22939.

[78] Bates v. State Bar of Arizona, ——U.S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 832 (1977).

[79] The letter contained all of the elements of a sales pitch (App. 3):
(1) the creation of a need;
(2) the receipt of something for nothing;
(3) the obscuring of the actual cost;
(4) a strong closing action.
The Direct Selling Industry: An Empirical Study, 16 U.C.L.A. Law Review 890, 906 (1969).

[80] For example, Mrs. Williams could have blamed her doctor for the child's illness, a factor unrelated to the issue of sterilization.

2. **Conflicts of Interest**

Personal solicitation of clients is not conducive to encouraging the kind of attorney-client relationship which the state can and should reasonably demand. While this conflict may traditionally derive from the element of pecuniary gain, it also often results in the context of legal service organizations. As observed by Mr. Justice Harlen:

> When an attorney is employed by an association or corporation to represent individual litigants, two problems arise, ***whether or not the association is organized for profit and no matter how unimpeachable its motives.*** The lawyer becomes subject to the control of a body that is not itself a litigant and that, unlike the lawyer it employs, is not subject to strict professional discipline as an officer of the court. *NAACP* v. *Button*, 371 U. S. 415, 461, 83 S. Ct. 328, ——, 9 L. Ed. 2d 405, 434 (1963) (dissenting opinion). (Emphasis added.)

The Court in *Button* found no conflict of interest because, first, there were no monetary stakes and, secondly, the aims of the client and organization were identical. *NAACP* v. *Button*, 371 U. S. 415, 424, 83 S. Ct. 328, ——, 9 L. Ed. 2d 405, 424 (1963). Both of these elements are missing in the present case.

The ACLU, as shown by the record in this case, would have financially benefited from court awarded attorney fees (App. 188). Appellant would have been financially benefited[81] through "foundation" grants which require her involvement in such litigation (App. 144-5). But of more importance in this case was the obvious lack of identity of aims and interests of the organization and its non-member potential client. The purpose of the ACLU is advancement of civil liberties (App. 183); the interests of the potential

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[81] Appellant's private law partner, who served also as a staff attorney for the ACLU, would have benefited financially, since court awards of attorneys fees are used among other things to pay the salaries of staff attorneys

client was no doubt to recover money damages (App. 70). It is easy to see, for example, that a monetary settlement, while satisfactory to the client, might not be satisfactory to the organization, which is more concerned with setting "civil liberties legal precedents of broad effect" (App. 177). There is always the danger that important individual causes of action which do not further the purposes of the organization will be omitted or subordinated to issues of more interest to the organization.[82] A cause of action in tort may be obscured in order to promote the civil liberties issue, to the disadvantage of the client.[83] The danger that the organization will control the litigation or interfere in the attorney-client relationship is apparent in instances where, as in this case, the organization's main efforts are exerted through litigation.[84] The State cannot be foreclosed from its legitimate interest in protecting the public from such conflicts of interest merely by an organization's policy, written or unwritten, providing that the attorney's

[82] The ACLU Policy Guide (1976) referred to by Appellant in her Brief (pp. 26, 52) also provides in Policy No. 513 that:

> In the direct representation of plaintiffs in affirmative suits, it is generally possible to specify the issues that will be raised in advance, *and as condition of the organization undertaking to provide legal representation.* The issues can often be defined and limited from the start; the case can be so shaped as to point up the civil liberties issues and avoid extraneous ones in a way not ordinarily available in defensive cases; and it is often possible to secure affirmative relief which will be of broad effect. (Emphasis added.)

[83] For example, in the subsequent litigation by the ACLU on behalf of two women who had been sterilized, *Doe* v. *Pierce*, No. 74-475 (D.S.C. 1974), the complaint contained a cause of action for malpractice. (Complainant's [Appellee's] Exhibit No. 2-to Panel Hearing (Not printed in Joint Appendix)). This cause of action, however, was dropped prior to trial.

[84] On April 15, 1974, the date the complaint in *Doe* v. *Pierce, supra*, was filed, the President of the South Carolina chapter of the ACLU and Appellant held a press conference in Columbia, South Carolina at which time the press release attached as an exhibit to the Deposition of Eldon D. Wedlock, Jr., Respondent's [Appellant's] Exhibit #2 to Panel Hearing (Not Reprinted in Joint Appendix). The press release stated, *inter alia*, that: "*The American Civil Liberties Union* today sued Dr. Clovis H. Pierce and Aiken County Hospital and four persons acquiescing or assisting the practice of compulsory sterilization." (Emphasis added.)

judgment must be governed by the client's interest and not the organization's.[85]

3. "Stirring up" Litigation

In urging this justification we do not view litigation as an evil which should be avoided. *NAACP* v. *Button, supra.* Nor is it asserted solely to deter those who might urge recourse to the courts solely for private gain [86] or for malicious intent, although the Court has recognized the legitimacy of restraints on such activities. *NAACP* v. *Button,* 371 U. S. 415, 440, 83 S. Ct. 328, ——, 9 L. Ed. 2d 405, 422 (1963). Of more immediate concern is the prevention of solicitation by organizations or individuals who have no standing to initiate the litigation themselves and, therefore, seek plaintiffs merely to obtain access to the courts.[87] The state's interest in preventing the stirring up of litigation is especially great when, as here, the litigation would interfere with established relationships.[88]

4. Misleading

The Court in *Bates* recognized that advertising which is false, deceptive, or misleading is subject to restraint. —— U. S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 835 (1977). Certainly, solicitation which results in false, deceptive or misleading information can likewise be restrained. Moreover, the court in *Bates* limited permissible advertising

[85] Appellant's Brief, page 52, fn. 1.

[86] The majority in *NAACP* v. *Button* noted the traditional condemnation of a lawyer urging private litigation for personal gain. The record in this case does establish that the ACLU and Appellant would financially benefit from the proposed litigation.

[87] Mr. Justice Harlan in his dissenting opinion in *NAACP* v. *Button*, 371 U. S. 415, 436, 83 S. Ct. 328, ——, 9 L. Ed. 2d 405, 436 (1963), stated:

> [T]he state policy is not unrelated to the federal rules of standing — the insistence that federal court litigants be confined to those who can demonstrate a pressing personal need for relief.

[88] Dr. Clovis H. Pierce was a private physician who had delivered Mrs. Williams' children. At the time of Appellant's letter, both she and her child were under his care (App. 60). As a result of the action in *Doe v. Pierce*, Civ. No. 74-475 (D.S.C.), Dr. Pierce will no longer accept Medicaid patients. *Walker* v. *Pierce*, 560 F. 2d 609, 612 (1977).

by attorneys to **routine** legal services, recognizing that more complex services are unique and thus likely to be inherently misleading. *Id.* at 828.

It is submitted that solicitation does not provide any foundation for the prospective client to select an attorney and therefore is inherently misleading. Solicitation will result in the creation of "images" and the use of subtle, or even overt, "puffing" by the attorney, a tactic that not only would mislead the client but also would be virtually impossible for the state to regulate.[89] *See, Bates* v. *State Bar of Arizona, supra,* at 829-30. The soliciting attorney will emphasize the benefits of his retention while down-playing its drawbacks until the client is "bagged."[90]

The letter of solicitation in this case was misleading not so much by what it said, but for what it did not say. Initially, it should be noted that it did not inform Mrs. Williams that the ACLU would render the legal services free, as contended by Appellant. Besides being written on the stationery of Appellant's law firm and signed by Appellant as attorney-at-law, a fact that would mislead the reader to believe that the Appellant would be Mrs. Williams attorney,[91] the letter failed to provide Mrs. Williams with information of what would be accomplished by the lawsuit other than recovery of money damages (*See,* App. 70). But, the most important omission in the letter was failing to advise Mrs. Williams of the potential conflict of interest —*i.e.,* that Mrs. Williams might have to forego or subordinate other causes of action to her "civil liberties" remedies.[92]

[89] One need only consider the many tactics used by salesmen in the business world, the "loss leader", "bait and switch", "something for nothing", etc. to realize that permitting solicitation would open the door to problems that will be impossible for the courts to cope with.

[90] Studies conducted under the auspices of the American Bar Foundation reveal that most complaints against attorneys are the result of flaws in the attorney-client contract or alleged deficiencies in the attorney's performance under that contract. *See, Lawyers, Clients, and Professional Regulation,* ABF Research Journal 919 (1976). As to performance of attorneys under system permitting solicitation refer to paragraph 6, *infra.*

[91] Mrs. Williams was under the impression that Appellant would be her lawyer (App. 32), a fact denied by Appellant (App. 94). But even statements which are true and not intended to deceive can be inherently misleading. For example, Appellant informed Mrs. Williams that a Mrs. Waters, an acquaintance of Mrs. Williams, had already requested the ACLU to file suit. Mrs. Williams might make the unwarranted inference from this statement that Mrs. Waters had determined that the attorneys for ACLU were especially competent to handle her case.

5. Undesirable Effects on the Quality and Costs of Legal Services

In *Cohen* v. *Hurley,* 366 U. S. 117, 81 S. Ct. 954, 6 L. Ed. 2d 156 (1961), the Court recognized that it was a legitimate state concern that attorneys not devote so much time to the "business" of getting clients that he neglects his duties to the court. Solicitation will make it possible for attorneys who are not competent and do not enjoy a good reputation to subsist through "one time" clients. Solicitation not only discourages competence and skill among attorneys, but also deprives present clients of the attorney's time best spent in legal research and in court.[93]

Moreover, by permitting an aggressive attorney to secure an unsophisticated client with an early retainer con-

[92] *See,* footnote 78, *supra.* In *Va. Pharmacy Bd., supra,* the Court recognized that physicians and lawyers do not dispense standardized products, thus the dangers of abuse and deception may be greater. The Court further stated that such dangers would be greater at the professional judgment level, as for example when a drug is prescribed by a physician, than on the sales level when dispensed by a licensed pharmacist. Likewise, the dangers of abuse are greater when the solicitation is undertaken by attorneys, rather than, for example, non-legal services organization, such as the lawyer referral services in *Brotherhood of R. Trainmen, United Mine Workers,* and *United Transportation Union, supra.*

[93] The record does not indicate any incompetence by Appellant as an attorney. Nevertheless, the argument that skill and competency are fostered by a system whereby the attorney is sought by the client, rather than the client by the attorney, does not lose any of its vitality in the context of legal services organizations. Recently, the Court recognized the interest of the State in maintaining the quality of medical care provided within the State. *Bigelow v. Virginia,* 421 U. S. 809, 827, 95 S. Ct. 2222, _____, 44 L. Ed. 2d 600, 615 (1975). It is submitted that the State's interest in the quality of legal services rendered to its citizens is no less compelling.

tract, solicitation would even have an anti-competitive effect. If the prospective client is contacted at his home, the hospital, or the accident scene, he would probably select an attorney by "who gets there first." Since he is unable in such contexts to ascertain the fees charged by other attorneys for such services, he may end up paying more for the legal services.[94] Although this aspect may be of limited importance in the case of an organization offering free legal services to clients, it must be realized that the organization's attorneys fee will be in many instances paid by another consumer—the opposing party in litigation.

6. **Invasion of Privacy**

As discussed in Part A of this Argument, personal solicitation invariably involves the invasion of the privacy of the prospective client and results in the solicitor's message being thrust upon him as a captive audience.[95] *Breard v. Alexandria,* 341 U. S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951); *Lehman v. City of Shaker Heights,* 418 U. S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974); *Rowan* v. *United States Post Office,* 397 U. S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970). Surveys of consumer attitudes toward home solicitation indicate that unannounced and uninvited personal solicitation was considered an unwarranted invasion of privacy.[96]

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[94] This conclusion is supported by the experience in the business world. The Federal Trade Commission in its hearings found that excessive prices were charged for products sold in the home. 37 Fed. Reg. 22939.

[95] See text accompanying footnote 63, *supra.*

[96] *The Direct Selling Industry: An Empirical Study,* 16 U.C.L.A. Law Review 890 (1969). In the FTC hearings in 1972, the hearing officer reported that "[t]he nuisance occasioned by the unannounced and uninvited call has long been recognized and regulated by local authorities." 37 Fed. Reg. 22938.

As compendiously put by Professor Zechariah Chafee in his work, FREE SPEECH IN THE UNITED STATES,

> Of all the methods of spreading unpopular ideas [home solicitation] seems the least entitled to extensive protection. The possibilities of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires. *Id.* at 406.

In this case, Appellant's uninvited[97] letter of solicitation, was received as an unwarranted invasion of Mrs. Williams' privacy (App. 57).

7. **Adverse Effects on the Administration of Attorney Discipline**

> In view of the sheer size of the profession, the existence of a multiplicity of jurisdictions, and the problems inherent in the maintenance of ethical standards even of a profession with established traditions, the problem of disciplinary enforcement has proven to be extremely difficult. *Bates* v. *State Bar of Arizona,* ——U.S.——, 97 S. Ct., ——, 53 L. Ed. 2d 810, 844 (1977) (dissenting opinion).

The above observation of Justice Powell in *Bates, supra,* no matter how dramatic it seems, can only be considered an **understatement**. At a time when the existing machinery of professional discipline for attorneys has been challenged as inadequate,[98] the Court is now asked to permit the practice of solicitation by attorneys. While published advertising could give some tangible means for effectively policing its content, personal solicitation, often in the presence of only the client, would make it impossible to determine if

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[97] Not only had Mrs. Williams not requested Appellant's services (App. 34, 138), she had advised Appellant that she would contact Appellant if legal services were needed (App. 74).

[98] *See, e.g.,* ABA Special Committee on Evaluation of Disciplinary Enforcement (Clark Report, June 1970).

the client was misled, or his interests subordinated or abandoned. Appellant argues that a distinction can be drawn between solicitation on the basis of whether a fee is involved. No such simplistic approach can be taken for it obviously overlooks many other shortcomings involved in solicitation by attorneys. Certainly not all lawyers will mislead, overreach, or subordinate the interests of their clients. However, the state does have the right and the legitimate interest in restraining methods of competition which will cause an undue burden on disciplinary enforcement especially when more appropriate means exist to inform the public of the availability of legal services.

7. **Professionalism**

The Appellant dismisses as speculative the state's interest in preserving the dignity of the profession. Regardless of whether one feels the majority in *Bates, supra,* gave appropriate consideration to this compelling interest, a reexamination is mandated for the more pressing question involved with solicitation. One commentator of the current "image" of the legal profession observed:

> The legal profession is currently the subject of controversy and criticism. Individual attorneys are often described as unethical and incompetent, while the bar is portrayed as politically partisan, captive of economic interests, and unresponsive to the public interest. Public opinion polls document disrespect for attorneys as a group. Local and national scandals highlight criminal acts of prominent attorneys. The cost, quality, and availability of legal services are matters of public debate. E. Steele and R. Nimmer, *Lawyers, Clients, and Professional Regulation,* 3 ABF Research Journal 919-20 (1976).

We do not intend to restate the rather extensive argument made to the Court in *Bates.* While the assertion that advertising will diminish the reputation of the profession may have been open to question, that result is assured if the Court overrules the prohibition against solicitation.[99]

A client who has been overreached, misled, charged a high fee, or had his interests subordinated to the interest of the attorney is likely to circulate uncomplimentary remarks about the profession. When the public loses confidence in the bar, a doubt is created in the integrity of the court.

II

The Disciplinary Rules are not vague or overbroad.

As previously noted, the South Carolina Supreme Court found that Appellant had violated Disciplinary Rules 2-103(D)(5) (a) and (c) and 2-104(A)(5) of the ABA Code of Professional Responsibility. The first rule, DR 2-103(D)(5) (a) and (c) prohibits a lawyer who assists or cooperates with a non-profit organization that furnishes or pays for legal services to its members or beneficiaries, from recommending to a non-lawyer that he retain the organization's lawyers if: 1) the organization has a primary purpose of rendering legal services, or 2) the organization derives financial benefit from rendering the legal services. The second rule, DR 2-104(A)(5), prohibits a lawyer who has given unsolicited legal advice to a member of the public from subsequently *seeking* that person as a member of a plaintiff class. Appellant argues that these disciplinary rules are vague and overbroad.

A. **Vagueness**

Appellant argues that DR-2-103(D)(5)(a) and (c) and DR 2-104(A)(5) are vague in that they do not give fair notice of the conduct proscribed. Appellant maintains, for

[99] In a survey of solicitation practices in the business world, it was noted that even where product dissatisfaction was relatively low, consumers expressed an extremely negative attitude toward personal solicitation. *The Direct Selling Industry: An Empirical Study,* 16 U.C.L.A. Law Review 890 (1969).

example, that DR 2-103(5)(a) and (c) only prohibit an attorney from allowing an organization to promote his own services (J. S. 16). This construction ignores the plain language of that statute which provides:

> A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services *or those of his partners or associates.* (Emphasis added.)

The Appellant further argues that the words "primary" in DR-2-103(D)(5)(a) and "financial benefit" in subsection (c) are impermissibly vague.[100] But words necessarily contain germs of uncertainty. *Broadrick* v. *Oklahoma,* 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). In *CSC* v. *Letter Carrier,* 413 U. S. 548, 578-9, 93 S. Ct. 2880, ——, 37 L. Ed. 2d 796, 816 (1973), the Court stated:

> [T]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

Moreover, in discussing DR 2-104(A)(5), Appellant maintains that this disciplinary rule only prohibits the *acceptance* of employment and does not prohibit seeking out a client to be a party to the litigation. Again, Appellant has ignored the plain language of that DR which provides that

[100] Appellant's Brief, page 76. It seems somewhat incongruous for Appellant as an attorney to argue that the phrase "to the extent that controlling constitutional interpretation . . . requires" in DR 2-103(D)(5) is vague.

[101] *See,* ABA Informal Opinion No. 1234 which held that a "legal aid lawyer who desires to raise certain issues in litigation but who is handling no litigation involving such issues may not seek out indigents and request the indigents to, or advise the indigents to, become, as clients, parties to the litigation." The opinion found that such conduct violated provisions of DR 2-104(A) and DR 2-103(D).

". . . a lawyer may accept, but shall not seek. . . ."[101] Appellant attempts to avoid the plain language of these disciplinary rules by discussing them in the abstract. By avoiding the plain language of the rules and instead placing an obtuse interpretation on their terms, Appellant has attempted to show that the rules are vague and indefinite.

It is evident that the disciplinary rules in question are not so vague that "men of common inteligence must necessarily guess at its meaning." *Connally* v. *General Construction Co.,* 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926). It is all but frivolous to suggest that the disciplinary rules fail to give adequate warning of the activities they proscribe or to set out explicit standards for those that must apply the rule *Broadrick* v. *Oklahoma,* 413 U. S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). In the instant case, Appellant's conduct falls within the "hard core" of the disciplinary rules' prohibitions. By her own testimony Appellant was attempting to solicit Mrs. Williams as a member of the plaintiff class for a class action suit which the ACLU desired to bring. Moreover, this solicitation was performed on behalf of an organization which stood to gain financially from rendering this service. Appellant's contention that the disciplinary rules are void for vagueness is clearly erroneous and unsubstantial.

B. Overbreadth

The traditional rule governing constitutional adjudication is that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others or in other situations not before the court. *Broadrick* v. *Oklahoma,* 413 U. S. 601, 610, 93 S. Ct. 2908, ——, 37 L. Ed. 2d 830, 839 (1973). The Court has, however, permitted special overbreadth attack, regardless of whether the person's own conduct could be regulated by a more nar-

rowly drawn statute, because of the danger of tolerating, in the area of First Amendment freedoms, an overly broad statute susceptible to a sweeping and improper application. *See, Bigelow* v. *Virginia,* 421 U. S. 809, 816, 95 S. Ct. 2222, ——, 44 L. Ed. 2d 600, 608 (1975). Thus, an overly broad statute might serve to "chill" protected speech. *NAACP* v. *Button,* 371 U. S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). Nevertheless, facial overbreadth has been recognized "as strong medicine" which should be employed sparingly by the court. *Broadrick* v. *Oklahoma, supra.* The Court has also recognized that different forms of speech under the First Amendment may warrant a different degree of protection. For example, commercial speech, which is more durable than other kinds of speech, may require less protection since there is little likelihood that it will be chilled. *Va. Pharmacy Bd.* v. *Va. Consumer Council,* 425 U. S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Last Term, recognizing that the overbreadth analysis applied weakly, if at all, in the area of commercial speech, the Court declined to apply it to professional advertising by attorneys. *Bates* v. *State Bar of Arizona,* —— U. S. ——, 97 S. Ct. ——, 53 L. Ed. 2d 810, 834 (1977). The solicitation in the instant case did "no more than propose a commercial transaction." *Va. Pharmacy Bd.* v. *Va. Consumer Council, supra; Bates* v. *State Bar of Arizona, supra.* The overbreadth doctrine, therefore, should not be applied in the instant case.

III

The Appellant was given fair notice of the misconduct charged and the evidence does support the findings of misconduct.

A. **Fair Notice**

Appellant contends that she was denied due process of law in that the complaint did not provide her with sufficient notice of the conduct charged. In support of this contention, Appellant relies heavily on the case of *In Re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117, *reh. den.,* 391 U. S. 961, 88 S. Ct. 1883, 20 L. Ed. 2d 874 (1968). In *Ruffalo,* an Ohio Attorney, who had been charged with soliciting through an agent, defended against this charge by personally testifying that he had merely hired the individual to investigate cases, including cases against the agent's other employer. At the conclusion of his testimony, Bar counsel amended his complaint to further allege that attorney Ruffalo was guilty of unethical conduct by hiring an individual to investigate that individual's employer. No additional evidence was taken on the matter. The Supreme Court subsequently found that Ruffalo had engaged in unethical conduct, including the latter charge. This Court found that Ruffalo had no notice that his hiring the agent would be an ethical violation until after he and the agent had testified. The Court went on to hold that a disciplinary proceeding was quasi-criminal in nature; therefore, the attorney must have fair notice of the charges made and be afforded opportunity for explanation and defense.

In the instant case the complaint charged Appellant with solicitation and attached a copy of Appellant's letter of August 30, 1973, which provided that details of the misconduct charged (App. 1-4.). Appellant did not allege insufficient notice in answering the complaint (App. 18-20), made no motion to make the complaint more definite and

certain at any point during the hearing (J.S.A. 8a),[102] informed the panel before the hearing that she was familiar with the charge in the complaint (App. 28), and even utilized witnesses who testified with obvious knowledge of the specific disciplinary rules involved in the complaint (App. 168-9, 183-4). In *Ruffalo, supra,* the Court stated:

> The charge must be known before proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused.[103]

The complaint in this case was never amended to allege any new charges, and Appellant was given full opportunity to be heard on the solicitation charge.

Appellant contends that she did not receive adequate notice of the charge in that no disciplinary rules were specified in the complaint. In the case of *Burns* v. *Clayton,* 237 S. C. 316, 333, 117 S. E. 2d 300, 308 (1960), the South Carolina Supreme Court stated:

> Technical formality of allegation, as in an indictment, is not required in proceedings such as the present. All that is requisite to their validity is that the respondent be clearly apprised of the charges, *i.e.,* the facts upon which the claim of misconduct is founded, and that he

[102] The failure to raise objection has been held to bar an attorney from complaining of lack of notice under *Ruffalo, supra.* Louisiana State Bar Association v. Jacques, 260 La. 803, 257 So. 2d 413 (1972).

[103] It is interesting to note the observation of the Maryland Court of Appeals in *Bar Association of Baltimore* v. *Cockrell,* 274 Md. 279, 334 A. 2d 85, 88-9 (1975):

> In reviewing this recommendation, we note initially that if *Ruffalo* is strictly applied as it literally reads, then its broad holding would have a crippling effect on the primary purpose of disciplinary proceedings which, as we have held, is "not for punishment, but rather [is] a catharsis for the profession and a prophylactic for the public." [Citations of authority omitted.] For example, if *Ruffalo* means in all cases what its words seem to indicate, once an attorney is brought before a disciplinary tribunal for some minor offense he can take the stand and make known every other professional indiscretion (perhaps even those of a more serious nature) he ever perpetrated and, in this way, immunize himself from any potential professional censorship for them because, under *Ruffalo,* "due process" would prevent an amendment of the initial allegations.

> be afforded reasonable opportunity for explanation and defense.[104]

Under this standard, it is obvious that the Appellant was sufficiently informed of the nature of the charge against her. The complaint charged the Appellant with misconduct in the form of solicitation in violation of the Canons of Ethics. In addition, a copy of the letter which the Appellant wrote was attached to the complaint to inform Appellant of the set of facts on which the solicitation charge was based. The fact that the complaint did not specify the particular disciplinary rules that Appellant violated does not render the complaint invalid.[105] The Supreme Court of New Jersey in *In Re Kamp,* 40 N. J. 588, 194 A. 2d 263 (1963), rejected the argument advanced by the Appellant when it held that the New Jersey Supreme Court Rule mandating that every complaint in a disciplinary action against an attorney contain "the facts constituting the alleged misconduct on the part of the attorney" did not extend so far as to "require that the complaint specify the particular canon or canons allegedly violated." 194 A. 2d at 242.[106]

[104] *In Seventh District Committee of the Virginia State Bar* v. *Gunter,* 212 Va. 278, 183 S. E. 2d 713 (1971), a similar finding was made by the Virginia court:

> "A proceeding to discipline an attorney is not a criminal proceeding and the purpose is not to punish him but to protect the public. It is a special proceeding, civil and disciplinary in nature, and of a summary character. It is in the nature of an inquest or inquiry as to the conduct of the attorney. Being an informal proceeding it is only necessary that the attorney be informed of the nature of the charge preferred against him and be given an opportunity to answer." 183 S. E. 2d at 717.

[105] The complaint charged Appellant with solicitation, a charge to which only one canon of the Code of Professional Responsibility addresses itself-that being Canon 2. Canon 2 has only two disciplinary rules, which apply to solicitation by lawyers, DR 2-103 and DR 2-104. The court below found that Appellant violated both of these disciplinary rules.

[106] The Preamble of the Code of Professional Responsibility notes that it would be impossible for any code to particularize all of the duties of a lawyer. The enumeration of particular duties should not be construed as a denial of others equally imperative though not specified.

> In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of difficult tasks. Not every situation can be forseen, but fundamental ethical principles are always present to guide him. Within the framework of these

Appellant, relying on *In Re Ruffalo, supra,* for the proposition that a disciplinary proceeding is of a quasi-criminal nature, has cited several criminal cases to support her contention that the complaint should have specified the disciplinary rules violated.[107] Utilizing this proposition, it is interesting to note that the federal courts have consistently held that it is the statement of facts in a criminal indictment and not the statutory citation that is determinative of the indictment's validity. *United States* v. *Bethany,* 489 F. 2d 91, 93 (5th Cir. 1974); *United States* v. *Malicote,* 531 F. 2d 439, 440 (10th Cir. 1975).

B. **The Evidence Supports the Finding of Misconduct.**

With respect to DR 2-103(D)(5)(a) and (c), the court below found that Appellant who acted as cooperating attorney for the ACLU as well as Vice-President of the South Carolina Chapter, had solicited a client on behalf of the ACLU, an organization which has a primary purpose of rendering legal services and which would financially benefit in the event of successful prosecution of the suit for money damages (J.S.A. 6a; App. 188). The court noted that the Appellant's law partner was a staff attorney for the ACLU whose salary was paid out of a central fund into which awards of attorney fees are deposited (J.S.A. 10a). The Court also noted that her law partners were counsel of record in the subsequent litigation which arose out of these events (J.S.A. 3a).[108] It is obvious that Appellant's letter was promoting the use of the ACLU's legal staff, which included herself, her private law partners, and other law-

principles, a lawyer must with courage and foresight be able and ready to shape the body of law to the ever changing relationships of society.

See also, Preamble and Preliminary Statement, *Code of Professional Responsibility,* footnote 4, page 1.

[107] Appellant's Brief, page 68.

[108] *See,* footnotes 2 and 3, *supra.*

yers who associate or cooperate with the ACLU.[109] The evidence amply established a violation of this disciplinary rule.

With respect to DR 2-104(A)(5), the Court found that the disciplinary rule prohibited solicitation of clients for joinder in a class action (J.S.A. 92). By Appellant's own testimony, this was the purpose of her letter (App. 136-7). Appellant's contention that the ACLU did not already have a client for their proposed lawsuit with whom they sought to join Mrs. Williams is refuted by Appellant's letter itself (App. 4). Again, the record amply establishes a violation of DR 2-104(A)(5).

CONCLUSION

For the foregoing reasons, the Order and Judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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[109] Appellant's contention that there was a stipuation at the hearing that the ACLU was a "legal aid office" or "public defender office" is frivolous. The only "stipulation," if any, was as to the witness's testimony that "the purpose of the ACLU is to advance and defend the cause of civil liberties under the protection of the United States Constitution" (App. 183).